No. 92-2058

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAWAIIAN AIRLINES, INC.,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

*CHARLES A. SHANOR
JOHN J. GALLAGHER
MARGARET H. SPURLIN
PAUL, HASTINGS, JANOFSKY & WALKER
1050 CONNECTICUT AVE., N.W.
TWELFTH FLOOR
WASHINGTON, D.C. 20036
(202) 223-9000

FOR AMICUS CURIAE THE AIR TRANSPORT ASSOCIATION OF AMERICA

*COUNSEL OF RECORD

JULY 23, 1993

No. 92-2058

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAWAIIAN AIRLINES, INC.,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of this Court, the Air Transport Association of America ("ATA") moves for leave to file a brief *Amicus Curiae* in support of Hawaiian Airlines' petition for certiorari.[1] ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by United States carriers. All of ATA's members are vitally affected by state court decisions that undermine the comprehensive procedures of the Railway Labor Act ("RLA") for resolution of employment disputes.

The inconsistent preemption doctrines that now exist in the various state and federal courts needlessly spur litigation and burden the airline industry because they undermine the effectiveness and authority of Adjustment

---

1 Respondent Grant T. Norris has refused to consent to the filing of ATA's *amicus* brief.

Boards created under the RLA for the prompt, orderly, and peaceful resolution of disputes. ATA is in a unique position to explain these undesirable effects upon the industry as a whole. Therefore, ATA seeks leave to support the petition for certiorari, to urge the Court to clarify the pre-emption doctrine under the Railway Labor Act, as set forth more fully in the accompanying proposed Brief.

Respectfully submitted,

*Charles A. Shanor
John J. Gallagher
Margaret H. Spurlin
PAUL, HASTINGS, JANOFSKY
& WALKER
1050 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036
(202) 223-9000

For Amicus Curiae
The Air Transport Association
of America

**Counsel of Record*

July 23, 1993

No. 92-2058

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAWAIIAN AIRLINES, INC.,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

*CHARLES A. SHANOR
JOHN J. GALLAGHER
MARGARET H. SPURLIN
PAUL, HASTINGS, JANOFSKY &
WALKER
1050 CONNECTICUT AVE., N.W.
TWELFTH FLOOR
WASHINGTON, D.C. 20036
(202) 223-9000

FOR AMICUS CURIAE
THE AIR TRANSPORT
ASSOCIATION OF AMERICA

**COUNSEL OF RECORD*

JULY 23, 1993

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

I. PREEMPTION OF OVERLAPPING STATE LAW IS ESSENTIAL TO PRESERVE THE AUTHORITY AND EFFECTIVENESS OF ADJUSTMENT BOARDS UNDER THE RLA . . 3

II. THIS COURT SHOULD RESOLVE INCONSISTENT PREEMPTION STANDARDS THAT ENCOURAGE LITIGATION AND BURDEN RLA CARRIERS 6

A. Lower Courts Disagree On Whether *Lingle* Applies To Railway Labor Act Cases 8

B. Lower Courts Disagree On Whether RLA Arbitration Applies to Grievances Not Explicitly Covered by the Collective Bargaining Agreement 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: Page(s)

Alaska Airlines, Inc. and Air Line Pilots Ass'n, 88 AAR (Lab. Rel. Press) 0108 (1988) 11
Andrews v. Louisville & N. R.R., 406 U.S. 320 (1972) 4, 8
BRT v. Chicago R. & I. R.R., 353 U.S. 30 (1957) 5
Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990), *citing with approval, Baldracci v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) 9
Beard v. Carrollton R.R., 893 F.2d 117 (6th Cir. 1989) 9
Consolidated Rail Corp. v. RLEA, 491 U.S. 299 (1989) 11, 12
Croston v. Burlington N.R.R., U.S. App. LEXIS 15890 (9th Cir. 1993) 10
Davies v. American Airlines, Inc., 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993) 4, 9, 12
Elgin, J. & E. Ry v. Burley, 325 U.S. 711 (1945) 3, 11, 12
Grote v. Trans World Airlines, Inc., 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990) 7, 9, 10
IAM v. Central Airlines, 372 U.S. 682 (1963) 4, 7
IAM v. Street, 367 U.S. 740 (1961) 3
Lingle v. Norge Div. of Magic Chefs, Inc., 486 U.S. 399 (1988) 8
Lorenz v. CSX Transp., Inc., 980 F.2d 263 (4th Cir. 1992) 7, 9, 10, 12
Magnuson v. Burlington N., Inc., 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) 7, 9

Page(s)

Maher v. New Jersey Transit Rail Operations, Inc., 593 A.2d 750 (N.J. 1991) 10, 11
Majors v. U.S. Air, Inc., 525 F. Supp. 853 (D. Md. 1981) 7
Mayon v. Southern Pacific Transport Co., 805 F.2d 1250 (5th Cir. 1986) 4
McCall v. Chesapeake & Ohio Ry., 844 F.2d 294 (6th Cir.) *cert. denied*, 488 U.S. 879 (1988) 9, 10
McCann v. Alaska Airlines, Inc., 758 F. Supp. 559 (N.D. Cal. 1991) 7
Merola v. National R.R. Passenger Corp., 683 F. Supp. 935 (S.D.N.Y. 1988) 7
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 10
Norris v. Hawaiian Airlines, 842 P.2d 634 (Haw. 1992) 9
Peterson v. ALPA, 759 F.2d 1161 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985) 9
Slocum v. Delaware, L & W R.R., 339 U.S. 239 (1950) 5
Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) 10
Stephens v. Norfolk & W. Ry., 792 F.2d 576 (6th Cir.), *amended*, 811 F.2d 286 (6th Cir. 1984) 9
Summit Airlines, Inc. v. Teamsters Local 295, 628 F.2d 787 (2d Cir. 1980) 7
Switchmen's Union v. National Mediation Board, 135 F.2d 785 (App. D.C.), *rev'd on other grounds*, 320 U.S. 297 (1943) 7
Union Pacific R.R. v. Price, 360 U.S. 601 (1959) 4
Union Pacific R.R. v. Sheehan, 439 U.S. 89 (1978) 3

No. 92-2058

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAWAIIAN AIRLINES, INC.,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

INTEREST OF THE AMICUS CURIAE

The Air Transport Association of America ("ATA"), is a non-profit unincorporated trade association of United States federally certificated air carriers. ATA was founded in 1936 to facilitate the exchange of ideas and information concerning matters that affect the airline industry, and to represent the member carriers in legislative, judicial and administrative matters.[1] ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a

---

1 The operator members include Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express Corp., Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and USAir. Associate members are Air Canada and Canadian Airlines International.

broad variety of issues of concern to its members. ATA also works closely with the various Federal agencies that regulate the airline industry such as the Federal Aviation Administration and the Department of Transportation. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. carriers. They employ over half a million people, and perform a vital function in the economy as a whole, transporting 452 million passengers over 447 billion miles in 1991.

Congress recognized the important role of air carriers in interstate commerce when it enacted the Federal Aviation Act and when, in 1936, it added air carriers to the coverage of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. Congress recently reemphasized the economic importance of the airline industry when it enacted legislation creating the National Commission to Ensure a Strong Competitive Airline Industry. PL 103-13, 107 Stat. 43.

All air carrier members of ATA are subject to the RLA and are vitally affected by state court decisions, such as the one below, that undermine the RLA's comprehensive procedures for resolution of employment disputes. These RLA procedures are designed to facilitate the peaceful and expeditious resolution of such disputes and to avoid interruptions to commerce. These procedures will be undermined if state and federal courts, like the Hawaii Supreme Court in this case, allow state law causes of action which overlap RLA remedies to escape preemption by the RLA. Moreover, in an era when airline losses approximate $4 billion per year, airlines are vitally concerned with effective management of operations which cross many state lines. These operations cannot be administered efficiently when varied local laws and remedies affecting employment relationships are held to be permitted, rather than preempted by the RLA.

I. PREEMPTION OF OVERLAPPING STATE LAW IS ESSENTIAL TO PRESERVE THE AUTHORITY AND EFFECTIVENESS OF ADJUSTMENT BOARDS UNDER THE RLA

In order to avoid interruptions to interstate commerce in the vital transportation industry, the RLA established exclusive and mandatory dispute-resolution processes "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" 45 U.S.C. § 151(a)(5). These dispute resolution processes allow no room for judicial intervention.[2] The RLA establishes detailed procedures for selection of employee representatives, for bargaining about contract formation (so-called "major disputes"), and for arbitration of a wide range of grievances and contract interpretation issues by Adjustment Boards (so-called "minor" disputes). *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 725-27 (1945). Because the RLA procedures are exclusive

---

2 The railroad industry was seen as a "state within a state" that evolved its own adjustment mechanisms, in which courts were to have no role:

> It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self adjustment by the railroad community of its own industrial controversies. These were certainly not expected to be solved by ill adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration.

Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 752 (1945) (Frankfurter, J. dissenting); *IAM v. Street*, 367 U.S. 740, 760 (1961) (quoting above language with approval); *see also Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978) (Court may not overturn Adjustment Board's decision on legal issue regarding tolling of statute of limitations).

and mandatory, the RLA has long been held to preempt state law which would otherwise apply to the employment relationship.[3] The rights of air carriers and their employees under these RLA procedures are subject to federal common law because the "needs of the subject matter manifestly call for uniformity." *IAM v. Central Airlines*, 372 U.S. 682, 692 (1963).

As interpreted and applied below, this salutary preemption doctrine is eviscerated by application of newly emerging state law causes of action to the airline industry. The decision below allows a grievant to have two proceedings in which to challenge an adverse employment decision, and two remedies for that grievance. Under the result below, a grievant who unsuccessfully contested his discharge "for cause" in arbitration could nonetheless secure a jury trial of the same facts under State law. *E.g., Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993) (discharged employee loses in arbitration but is successful in state action for wrongful discharge). Even a grievant successful in arbitration may seek additional relief not contemplated under the collective bargaining agreement. *E.g., Mayon v. Southern Pacific Transport Co.*, 805 F.2d 1250 (5th Cir. 1986) (discharged employee obtained reinstatement and backpay in arbitration,

3 *Union Pacific R.R. v. Price*, 360 U.S. 601, 617 (1959) (employee who fails to obtain reinstatement through Adjustment Board may not thereafter bring common law action for damages for wrongful discharge; "To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded 'as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision * * * [a contention] inconsistent with the Act's terms, purposes and legislative history.'"). *Accord Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972) (rejecting doctrine that discharged employee's resort to Adjustment Board was optional, and that he had alternative damages remedy under state law).

then filed additional state law claims for emotional distress; state law held to be preempted). Such dual processes are inherently destructive of the process which Congress has established. The prospect of inconsistent factual findings and remedies on the same evidence between an arbitrator and a state court is sure to undermine the credibility and finality of the RLA arbitration process. RLA Adjustment Boards will become "backup" remedies, or may delay their proceedings to avoid inconsistent results. The essential purpose of mandatory arbitration under the RLA, "the prompt and orderly settlement of all disputes," is fatally undermined.[4]

This case, in fact, well illustrates the dysfunctional results of abandoning RLA preemption of state law claims. When Respondent refused to sign a work record (a task required of mechanics by Article IV, D.4a of the collective bargaining agreement), he was held out of service pending investigation (a process established by Art. XV, F.1 of the collective bargaining agreement), and the normal grievance processes were followed to determine whether he should be disciplined for violation of the work rule. Respondent defended his refusal to sign a work record attesting that he had changed a tire on the ground that another part of the tire assembly was unsafe. Respondent relied on a provision of the collective bargaining agreement which said that "[a]n

4 Keeping disputes within the RLA framework of dispute resolution enhances the value and effectiveness of the Adjustment Boards and the collective bargaining process as a whole by allowing RLA conciliation procedures to work on a broad range of controversies and promotes industrial peace. *See BRT v. Chicago R. & I. R.R.*, 353 U.S. 30, 34 (1957) (rejecting the view that parties may voluntarily use Adjustment Board but may resort to economic duress, if that seems more desirable). The Adjustment Board is an extension of the collective bargaining process; what is done there is incorporated into the labor contract for the benefit of all the employees in that craft throughout the system. *See Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950) (settlement of dispute interpreting RLA labor contract "would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties").

employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." Art. XVII, F.

When Respondent lost the first step of the grievance process, he appealed to the next step. Soon thereafter, he abandoned the established grievance processes and filed suit in state court, claiming that the discipline imposed on him (a discharge reduced to a six week suspension) violated public policy. The public policy violation alleged was airline safety -- the very issue specifically addressed in Art. XVII, F. The holding below thus permits Respondent to take this claim before a jury and to completely bypass the grievance mechanism and the expertise of an arbitrator knowledgeable in industry practices as to matters explicitly covered by the collective bargaining agreement. Thus, the RLA's carefully tailored system of rights, processes and remedies is rendered irrelevant by the decision below.[5]

II. THIS COURT SHOULD RESOLVE INCONSISTENT PREEMPTION STANDARDS THAT ENCOURAGE LITIGATION AND BURDEN RLA CARRIERS

State and federal courts currently employ a variety of contradictory tests in determining RLA preemption. As a result, interstate air carriers cannot be sure which employment matters are subject exclusively to arbitration and which are subject to varying State laws.

Unlike the Labor Management Relations Act ("LMRA" or "NLRA"), the RLA requires representation and

5 Comprehensive RLA preemption does not eliminate all substantive rights available under state law. In the typical discharge case, for example, an employee is free to argue to an arbitrator that an unlawful motive, rather than just cause, was the real reason for his discharge. The parties are free, moreover, to expressly incorporate state law protection in the collective bargaining agreement if that is their desire.

collective bargaining at rail and air carriers to be "system-wide."[6] As a result, a single collective bargaining agreement generally applies to all of an airline's employees in one craft, throughout the United States. This Court has recognized that the needs of the subject matter manifestly call for uniformity, *IAM v. Central Airlines*, 372 U.S. at 691. Consistency and uniformity in administration of such collective bargaining agreements are greatly undermined, however, when airlines are confronted with varying standards of preemption in different state and federal courts. For example, state law claims based upon conduct similar to that alleged in this case -- discharge after the employee allegedly refused to lie regarding an FAA requirement -- have been found to be preempted by the Ninth Circuit. *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990). Courts have reached inconsistent results on RLA preemption of other employment issues as well.[7]

To demonstrate the extent of the problem, and the tremendous uncertainties which it creates for RLA carriers, their unions, and their employees, ATA summarizes below

6 *Switchmen's Union v. National Mediation Bd.*, 135 F.2d 785, 793-95 (App. D.C.), *rev'd on other grounds*, 320 U.S. 297 (1943) (RLA bargaining encompasses all employees in craft without geographic limit); *Summit Airlines, Inc. v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980) (representation under the RLA is system-wide).

7 *Compare Lorenz v. CSX Transp., Inc.*, 980 F.2d 263 (4th Cir. 1992) (defamation action arising out of investigation of suspected theft is preempted because it inextricably involves RLA grievance procedures); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (claim of infliction of emotional distress based on alleged abuse of investigation into employee's responsibility for train accident is preempted); *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981) (false imprisonment and theft claims are preempted because part of RLA grievance procedure), *with McCann v. Alaska Airlines, Inc.*, 758 F. Supp. 559, 564-65 (N.D. Cal. 1991) (torts arising out of investigation of suspected employee misconduct are not inextricably intertwined with grievance procedure, no preemption found); *Merola v. National R.R. Passenger Corp.*, 683 F. Supp. 935 (S.D.N.Y 1988) (same).

the various areas of conflict regarding the RLA preemption doctrine.

A. Lower Courts Disagree On Whether Lingle Applies To Railway Labor Act Cases

The Hawaii Supreme Court below applied the preemption standard articulated by this Court in *Lingle v. Norge Div. of Magic Chefs, Inc.*, 486 U.S. 399 (1988), a case arising under the LMRA. The plaintiff in *Lingle* alleged that the employer had unlawfully discharged her because she filed a workers' compensation claim. The Seventh Circuit held that *Lingle's* action for retaliatory discharge was preempted because it was "inextricably intertwined" with her grievance under the collective bargaining agreement, which required just cause for discharge. This Court reversed, holding that the origin of the claim, not factual parallelism, determines preemption under Section 301 of the LMRA, *i.e.* where the claim is premised in the terms of the contract, preemption is established under Section 301.

Because RLA grievance resolution is mandatory rather than voluntary,[8] this Court has stated that RLA preemption is "stronger" than preemption under the LMRA. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972) ("[S]ince the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in

8 *Compare* 45 U.S.C. § 153, 184 (under RLA all "grievances" *and* disputes under "agreements" referred to Adjustment) *with* 29 U.S.C. § 185 (under LMRA federal courts may resolve disputes arising out of labor contracts).

cases arising under that Act than it is in cases arising under § 301 of the LMRA").[9]

Many courts have applied in RLA cases the preemption standard that a state law claim "inextricably intertwined" with collective bargaining and the grievance machinery is preempted. *Lorenz v. CSX Transp. Inc.*, 980 F.2d 263 (4th Cir. 1992) (defamation claim "inextricably intertwined" with grievance procedures); *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, 580 (6th Cir.), *amended*, 811 F.2d 286 (6th Cir. 1984) ("inextricably intertwined" test); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (employee's emotional distress claim, arising from discharge after causing train crash, is preempted because inextricably intertwined with minor dispute process).

Other courts, including the Hawaii Supreme Court in this case, have refused to find RLA preemption of state wrongful discharge claims by applying the less preemptive *Lingle* standard.[10] Although the Fourth, Sixth, and Ninth

9 *Accord, Grote v. Trans World Airlines*, 905 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990) ("Congress made clear its interest in keeping railroad labor disputes simple and out of the reach of the often lengthy court process"); *Baylis v. Marriott Corp.*, 906 F.2d 874, 878 (2d Cir. 1990), *citing with approval, Baldracci v. Pratt & Whitney*, 814 F.2d 102, 106 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) ("RLA likely has greater preemptive reach than LMRA"); *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988) (exercise of state power over an area of activity specifically relegated to Adjustment Boards causes a danger of conflict with national labor policy great enough to mandate preemption); *Peterson v. ALPA*, 759 F.2d 1161, 1169 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985) ("unlike preemption under the NLRA, the preemption of state law claims under the RLA has been more complete."); *Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) ("[t]he standards under the two statutes may not be identical. . . . more likely that a state claim will interfere with federal interests in the context of the RLA.")

10 *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); *Norris v. Hawaiian Airlines*, 842 P.2d 634 (Haw.

(continued...)

Circuits have explicitly rejected application of *Lingle* under the RLA,[11] other courts, including the Tenth Circuit, have found *Lingle* applicable.[12]

If the Hawaii Supreme Court had applied the "inextricably intertwined" test, preemption would have been found, for at least two reasons. First, the agreement required Norris to sign off on work he had performed. If the inquiry under Hawaii law concerned Hawaiian Airlines' motive in disciplining Norris, the employer's defense that it had "just cause" under the collective bargaining agreement to discipline an employee who refused to sign off on work meant that the defense was "inextricably intertwined" with the CBA and RLA processes.[13]

---

10 (...continued)
1992); *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 759 (N.J. 1991).

11 *Croston v. Burlington N.R.R.*, 1993 U.S. App. LEXIS 15890 n.3 (9th Cir. 1993) ("preemption sweeps even broader under the RLA than under the NLRA"); *Lorenz*, 980 F.2d at 268 (4th Cir. 1992) ("The circuit courts that have considered *Lingle* in light of the RLA declined to extend its analysis beyond the NLRA context"); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 n.4 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) ("*McCall* did not involve the question of § 301 preemption"); *McCall v. Chesapeake & O. Ry. Co.*, 844 F.2d 294, 300 (6th Cir.), *cert denied*, 488 U.S. 879 (1988) (because of strong similarity between inquiry made by arbitration board and jury in state cause of action, the latter is "inextricably intertwined" with the grievance machinery of the collective bargaining agreement and the RLA and is preempted); *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir.) ("*Lingle* is inapposite because it deals with preemption under § 301 of the LMRA . . ."), *cert. denied*, 498 U.S. 958 (1990).

12 *Davies v. American Airlines*, 971 F.2d at 466 ("test articulated by *Lingle* . . . just as valid under the RLA as it is under the LMRA").

13 The "mixed motive" test is well established in all areas of labor law. Where motive is in issue, if the employer can prove its actions would have occurred in the absence of the protected conduct, no violation is found. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (applying mixed motive test under LMRA).

Second, the Hawaiian Airlines labor agreement expressly stated that "[a]n employee's refusal to perform work which is in violation of . . . any local, state or federal health and safety law shall not warrant disciplinary action."[14] Pet. App. 112a, CBA, Art. XVIII ¶F. The Hawaii Supreme Court interpreted this provision to refer *only* to safety issues in the workplace itself, not to public safety issues such as FAA regulations. In doing so, that court intruded upon the authority of the specialized tribunal that alone may interpret RLA contracts. It is certainly "arguable" that this provision would have protected Norris had the dispute gone through Adjustment Board procedures. *E.g. Alaska Airlines, Inc. and Air Line Pilots Ass'n*, 88 AAR (Lab. Rel. Press) 0108 (1988) (Sinicropi, Arb.) (pilot who refuses to fly aircraft on grounds defect in windshield rendered it nonairworthy has discipline mitigated by Adjustment Board). Clearly, the claim of wrongful discharge under state law was inextricably intertwined with interpretation of this clause. In sum, the "inextricably intertwined" test for preemption is the appropriate test to prevent either state or federal courts from usurping the unique role the Adjustment Boards play under the RLA.[15]

---

14 The Hawaii Supreme court stated that Hawaiian Airlines had not "point[ed] to any part of the CBA which demonstrates that the carrier and union have agreed on standards relevant to Norris' situation." Given the quoted language, this conclusion is clearly erroneous.

15 The existence of an arbitrable minor dispute under the RLA turns on whether a contract "arguably governs" the dispute or whether the carrier's contract justification for its actions is not "obviously insubstantial." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 307 (1989). This definition was developed to distinguish arbitrable minor disputes from "major" disputes of contract formation, *Elgin*, 325 U.S. 711 (1945). Nonetheless, courts deciding preemption issues frequently reason that, if a dispute is "arguably governed" by a collective bargaining agreement, it is a minor dispute for an Adjustment Board and therefore the RLA preempts state law claims. Other courts have reasoned that the minor dispute test was developed for another purpose, and should not be utilized to determine preemption. *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991).

B. Lower Courts Disagree On Whether RLA Arbitration Applies To Grievances Not Explicitly Covered by the Collective Bargaining Agreement

This Court stated in *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945), that minor disputes encompass not only grievances interpreting or applying the collective bargaining agreement, but also those "founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, *e.g.*, claims on account of personal injuries." *Id.* at 723.[16] The statute itself extends arbitration to "grievances" as well as disputes arising from the interpretation of contracts. 45 U.S. §§ 151(a)(5), 153 First (i), 184. This "omitted case" situation recognized in *Elgin* clearly is inconsistent with the NLRA preemption test of *Lingle*, because it expands mandatory arbitration beyond those claims that "arise under" a labor contract, to encompass claims that could be said to arise under state law or common law. Recently, the Fourth Circuit relied upon *Elgin*, and its so-called "omitted case" doctrine, to find preemption of certain state law claims against an RLA carrier. *Lorenz v. CSX Transp. Inc.*, 980 F.2d 263, 268 (4th Cir. 1992).

Conversely, to avoid the import of *Elgin*, the Hawaii Supreme Court held that the Court in *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299 (1989) ("*Conrail*"), implicitly abandoned the "omitted case" doctrine and more narrowly defined the matters that comprise minor disputes.[17] It is difficult to credit the proposition that *Conrail* narrowed *Elgin*

16 Claims based on personal injuries, of course, usually arise under state law.

17 While acknowledging that "the term 'grievances' as used in the mandatory arbitration provision of the RLA . . . may be literally read to include disputes outside a collective bargaining agreement," the Hawaii Supreme Court nonetheless concluded that "Congress intended to affect only those disputes involving contractually defined rights." Pet. App. at 244. *Accord Davies v. American Airlines, Inc.*, 971 F.2d at 467.

in this respect, because *Conrail* itself was an "omitted case" dispute (neither management nor the union contended that any portion of the collective bargaining agreement covered the drug testing at issue there), and the Court did not cite or discuss *Elgin* or mention the "omitted case" doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted, to resolve the conflict in the lower courts on the applicability of the *Lingle* preemption doctrine under the Railway Labor Act. This Court's determination of the applicability of *Lingle* under the RLA would also resolve the split in the lower courts concerning whether *Elgin* has been implicitly narrowed or overruled by *Conrail*.

Respectfully submitted

*Charles A. Shanor
John J. Gallagher
Margaret H. Spurlin
PAUL, HASTINGS, JANOFSKY & WALKER
1050 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036

For Amicus Curiae
The Air Transport Association of America

**Counsel of Record*

July 23, 1993